2000

# Ricky Lee Sanders v. Michael O. Leavitt, Kerry D. Steadman, Mary T. Noonan, Jan Graham, Carol Clawson, Linda Luinstra, Utah State Department of Human Services, Division of Family Services, National Center for Youth Law, William Lee Grimm, Monitoring Panel, Pamela Atkinson, Serianne Cotterell, Larry Lunt, Jones, Waldo, Holbrook and McDonough, Michael Patrick O'Brien, Bobbie Dawn Widdison and Travis Widdison: Brief of Appellee



Utah Supreme Court

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

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Case No. 20000203-SC

**IN THE UTAH SUPREME COURT**

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RICKY LEE SANDERS, individually, and in his capacity as the personal representative of the estate of Breanna Marie Loveless, Deceased,
Plaintiff/Appellant,

(2)

v.

MICHAEL O. LEAVITT, in his capacity as Governor of the State of Utah; KERRY D. STEADMAN, in her capacity as Executive Director of the Department of Human Services of the State of Utah; MARY T. NOONAN, in her capacity as Director of the Division of Child and Family Services of the State of Utah, JAN GRAHAM, in her capacity as Attorney General of the State of Utah; CAROL CLAWSON, in her capacity as Solicitor General of the State of Utah; LINDA LUINSTRA, in her capacity as an Assistant Attorney General for the State of Utah; UTAH STATE DEPARTMENT OF HUMAN SERVICES; DIVISION OF FAMILY SERVICES; NATIONAL CENTER FOR YOUTH LAW; WILLIAM LEE GRIMM; MONITORING PANEL, created pursuant to the Settlement Agreement of the State of Utah, Department of Human Services, its Division of Child and Family Services; PAMELA ATKINSON, in her capacity as Chair of the Monitoring Panel; SHERIANNE COTTERELL, in her capacity as a member of the Monitoring Panel; LARRY LUNT, in his capacity as a member of the Monitoring Panel; JONES, WALDO, HOLBROOK & McDONOUGH; MICHAEL PATRICK O'BRIEN; BOBBIE DAWN WIDDISON; TRAVIS WIDDISON; and DOES 1 through 10,

Defendants/Appellees
Priority No. 15

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**BRIEF OF STATE DEFENDANTS - APPELLEES**

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Appeal from a Third Judicial District Court, the Honorable Homer F. Wilkinson

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## LIST OF ALL PARTIES

To the best of Defendants Chandler's and Wright's knowledge, all interested parties appear in the caption of this Brief.

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| MICHAEL O. LEAVITT, et al., | : | |
| Defendants - Appellees. | : | |

# BRIEF OF STATE DEFENDANTS - APPELLEES

Defendants Michael O. Leavitt, Kerry Steadman, Mary T. Noonan, Jan Graham, Carol Clawson, Linda Luinstra, Pamela Atkinson, Sherianne Cotterell, Larry Lunt, the Monitoring Panel, the Utah Department of Human Services and the Division of Family Services submit this answering brief as appellees.

## STATEMENT OF JURISDICTION

This matter comes within the original jurisdiction of the Supreme Court of the State of Utah under Utah Code Ann. § 78-2-2(3)(j) (1996).

## STATEMENT OF THE ISSUES

1. The Division of Family Services (DFS) has retained its immunity relevant to the plaintiff's wrongful death claims that arise out of an assault and battery.

This issue was raised in the trial court by this defendant's motion to dismiss and its motion for summary judgment. R. 25-29, 187-89, 257-388, 625-29.

**STANDARD OF REVIEW:** This issue was decided below upon DFS's motion for summary judgment. Reviewing the trial court's grant of a motion for summary judgment "includes a determination of whether the trial court correctly applied governing law, affording no deference to the trial court's determination or conclusions of law." Burton v. Exam Ctr. Indus. & Gen. Med. Clinic, Inc., 2000 UT 18, ¶4, 994 P.2d 1261; Gardner v. Perry City, 2000 UT App 1, ¶6, 994 P.2d 811. "In matters of pure statutory interpretation, an appellate court reviews a trial court's ruling for correctness and gives no deference to its legal conclusions." Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997).

2. The trial court correctly determined that it was without jurisdiction to enforce a federal court consent decree and that plaintiff had no valid claim for damages based upon the federal consent decree.

This issue was raised by the defendants in their motion to dismiss. R. 32-36, 189-91.

**STANDARD OF REVIEW:** This matter was decided below upon the defendants' motion to dismiss. Because this issue raises only questions of law, the Court should give the trial court's ruling no deference and review it under a correctness standard. Zion's First National Bank v. Fox & Co., 942 P.2d 324, 326 (Utah 1997).

3. The trial court was without jurisdiction to hear plaintiff's claims against the Monitoring Panel and defendants Pamela Atkinson, Sherianne Cotterell and Larry Lunt because no notice of claim was filed concerning these defendants.

This issue was raised in the defendants' motion to dismiss. R. 37-38.

**STANDARD OF REVIEW:** Because this issue raises only questions of law, the Court should give the trial court's ruling no deference and review it under a correctness standard. Zion's First National Bank v. Fox & Co., 942 P.2d 324, 326 (Utah 1997). Stephens v. Bonneville Travel, Inc., 935 P.2d 518, 519 (Utah 1997).

4. That the plaintiff failed to state a claim against the Monitoring Panel and defendants Pamela Atkinson, Sherianne Cotterell and Larry Lunt, who are also entitled to quasi-judicial immunity.

These issues were raised by the defendants' motion to dismiss. R. 38-43, 192-95.

**STANDARD OF REVIEW:** This matter was decided below upon the defendants' motion to dismiss. Because this issue raises only questions of law, the Court should give the trial court's ruling no deference and review it under a correctness standard. Zion's First National Bank v. Fox & Co., 942 P.2d 324, 326 (Utah 1997).

## DETERMINATIVE STATUTES

> Utah Code Ann. § 63-30-10(2) **Waiver of immunity for injury caused by negligent act or omission of employee - Exceptions.** (1992)
> Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of, in connection with, or results from: . . .

(2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;

Utah Code Ann. § 63-30-12 **Claim against state or its employee - Time for filing notice.** (1987)
A claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

## STATEMENT OF THE CASE

This action was filed by Ricky Lee Sanders on his own behalf and as the personal representative of the estate of Breanna Marie Loveless. R. 2. Breanna died on February 22, 1996. R. 6. Plaintiff pled a claim for wrongful death against the state defendants (Claims I and IV in the complaint) and for breach of contract and breach of an implied covenant of good faith and fair dealing (Claims II and III in the complaint). R. 9-14. Plaintiff also sued various attorneys who represented the plaintiffs in a federal court class action proceeding and Bobbie Dawn Widdison (Breanna's mother) and Travis Widdison. R. 14-17.

Default judgments were taken against Ms. Widdison and Travis Widdison. 234-35. The State of Utah defendants (Leavitt, Steadman, Noonan, Graham, Clawson, Luinstra, Atkinson, Cotterell, Lunt, the Monitoring Panel, the Utah Department of Human Services and the Division of Family Services (DFS)) filed a motion to dismiss. R. 20-

104, 136-38. The trial court granted this motion as to all of the state defendants except as to DFS. The wrongful death claim (Claim I) as to DFS was not dismissed. R. 238-42. The attorney defendants' motion to dismiss was also granted. R. 236-37.

DFS then filed a motion for summary judgment on the remaining wrongful death claim. R. 245-388. The trial court granted this motion on February 14, 2000. R. 733-37. While no final judgment has been entered against Bobbie Dawn Widdison and Travis Widdison, the trial court certified its decision of February 14, 2000 as a final order. R. 736-37. Plaintiff filed his notice of appeal on March 9, 2000. R. 742-44.

## STATEMENT OF RELEVANT FACTS

Plaintiff's minor daughter, Breanna, died on February 22, 1996 as the result of pneumonia, which resulted from and was aggravated by the abuse and neglect to which she was subjected by her mother, Bobbie Dawn Widdison, and her mother's boyfriend, Travis Widdison. R. 6, 8. In his complaint, the plaintiff expressly alleged:

> 27. On February 21, 1996, Breanna was taken to the Delta Community Medical Center Emergency Room in Delta, where she died in the early morning hours of February 22, 1996. The immediate cause of Breanna's death was pneumonia, which resulted from and was aggravated by the abuse and neglect to which she had been subjected. The medical examiner determined specifically that the pneumonia was aggravated by physical abuse and Breanna's generally weakened condition.
>
> 48. The State defendants breached their agreement with Breanna, and their breach of the agreement foreseeably led to Breanna's abuse, suffering, and death at the hands of Bobbie Dawn and Travis.
>
> 79. Bobbie Dawn and Travis, together, in willful and deliberate disregard of the health, care, safety and well-being of Breanna, neglected her health,

> care, safety and well-being, and also physically abused her, to the point at which, in a weakened condition, she developed pneumonia which caused her death.

R. 8, 12, 17.

Breanna was a member of the plaintiff class in a federal action entitled David C. v. Leavitt, 93-C-206W (D.Utah 1994). R. 4-5. The parties to that action entered into a settlement agreement that a consent decree could be issued on May 17, 1994. R. 49-104. Defendants Leavitt, Steadman, Noonan, Clawson, and Luinstra signed the settlement agreement. R. 100. The settlement agreement did not provide for any monetary damages for a breach of the agreement, but instead provided:

> The Court [U.S. District Court for the District of Utah] shall retain jurisdiction over these claims solely for the purpose of enforcement of the Agreement. If non-compliance is not resolved through the corrective action process, as described above, the Court may enter any necessary orders to enforce the Agreement.

R. 98.

The settlement agreement provided for the appointment of three persons to serve as a Monitoring Panel to determine compliance with the consent decree. R. 95. The panel was to provide quarterly reports as to how well the State of Utah was complying with the conditions of the settlement agreement. R. 96-97. If the panel determined that there had been non-compliance with the agreement, it had the authority to adopt corrective action plans (either as submitted by DFS or as created by the panel) to remedy such non-compliance. R. 97. The determinations of the panel could be reviewed by the

United States District Court for the District of Utah. R. 97-98. The settlement agreement established that the sole remedy for solving problems concerning individual cases was for the plaintiff class' attorneys to bring the matter before the grievance council established by Utah Code Ann. § 62A-4a-102(3) (1994), and quarterly to bring such disputes to the monitoring panel. R. 98-104.

On May 15, 1998, Bobbie Dawn Widdison was convicted of "knowingly and intentionally inflicting upon B.M.C.L. [Breanna] a serious physical injury, or, having the care and custody of B.M.C.L., intentionally or knowingly causing or permitting another to cause serious physical injury to B.M.C.L.; caused the death of B.M.C.L., an infant who at the time was eight months of age." R. 270-79. She was convicted of murder, three counts of felony child abuse and three counts of misdemeanor child abuse. Id. Travis D. Widdison was convicted at the same time of inflicting serious physical injury on Breanna. R. 280-88. He was convicted of felony child abuse and two counts of misdemeanor child abuse. Id.

At the criminal trial, Dr. Robert H. Kirshner, a forensic pathologist, testified. R. 289-378. In preparation for the Widdison's criminal trial, Dr. Kirshner reviewed Breanna's autopsy records, medical records, and various documents relating to the investigation of her death. R. 309-10. The undisputed testimony was that Breanna was subjected to repeated abuse (assaults) before her death. R. 309-21. Dr. Kirshner testified that, in his expert opinion, Breanna died of the multiple episodes of abuse that she had

been subjected to. That, but for the abuse, she would not have died of pneumonia, which is often the terminal event for a child who has been chronically abused. This is so because the abuse has led to the suppression of the body's immune systems. R. 323-26.

> A. Well again, this pneumonia is the direct result of the fact that this is a battered child. And pneumonia is a terminal event in a child that has been repetitively battered over a number of weeks, and therefore, it's not coincidental that this child has pneumonia. It's not just an unfortunate occurrence. It's a predictable outcome of what has happened to this child and I've seen it again and again in battered children who finally succumb to pneumonia due to the effects of the abuse, the suppression of the immune system, which is the development of the infection. So to me, it is clearly a homicide.

R. 325-26.

Dr. Leis (the medical examiner who performed the autopsy on Breanna) testified that:

> A. Traumatic injury to the body will not only physically damage the body, but circumstances surrounding it can impart some degree of emotional trauma on the individual with recurrent trauma or maybe one episode of a significant degree. They may stress the body to such a point that a natural disease process which may normally in and of itself not progress to a fatal condition now attack the weakened body, if you will, and become more significant and lead to the death of the individual.

R. 448.

> Q. In your opinion, doctor, would Breanna Loveless have died of pnuemonia in the absence of effect of physical trauma that she also suffered?
> A. I don't believe so.

R. 450.

## SUMMARY OF ARGUMENT

While she died of pneumonia, Breanna's death arose out of the assault and battery committed upon her by her mother and her mother's boyfriend. The trial court correctly determined that there was some causal relationship between the physical abuse and the onset of the pneumonia. Under Utah law the immunity of DFS has not been waived for such claims. Plaintiff has failed to meet the high hurdle for seeking a reversal of this Court's previous decisions on this issue.

Plaintiff's contract claims arise out of alleged violations by the defendants of a settlement agreement reached in a federal matter. The trial court was without jurisdiction to seek to enforce such an agreement. Any enforcement should be left to the federal court which has retained ongoing jurisdiction over the proceeding. Further, the plaintiff has failed to articulate what rights under the agreement were violated. Indeed, the settlement agreement did not create any right for monetary damages.

The monitoring panel created by the settlement agreement is not a legal entity that can sue or be sued. The trial court was without jurisdiction of any claims for negligence against the members of the monitoring panel because no notice of claim was filed concerning them. Its members are entitled to quasi-judicial immunity and the plaintiff failed to state a claim against them.

## ARGUMENT

### I. DFS IS IMMUNE BECAUSE PLAINTIFF'S ALLEGED INJURIES AROSE OUT OF AN ASSAULT OR BATTERY

On appeal, plaintiff challenges the dismissal of his wrongful death claim only as to the Division of Family Services (DFS). R. 743. Neither his notice of appeal nor his opening brief has challenged the dismissal of his wrongful death claim as to the other state defendants based upon his failure to file the proper notices of claim concerning them.

This Court has applied a three step approach to determining whether or not immunity is applicable to a specific case. Ledfors v. Emery County Sch. Dist., 849 P.2d 1162, 1164 (Utah 1993). The first step is to determine whether the activity performed by the entity is a governmental function. The Utah Governmental Immunity Act grants immunity to governmental entities in their exercise of governmental functions. Utah Code Ann. § 63-30-3 (1991). In the instant action, plaintiff has stated that he does not dispute that this step is met. Appellant's Brief at 33.

The second step requires a determination of whether there is a waiver of immunity. If such a waiver exists, the third step involves a determination regarding any exceptions to the waiver.

The Governmental Immunity Act, Utah Code Ann. § 63-30-1, et seq., does not contain a waiver of immunity for intentional torts such as assault and battery. Atiya v.

Salt Lake County, 852 P.2d 1007, 1011 (Utah App. 1993). Bobbie Dawn Widdison and Travis Widdison were named as parties to this action and they have been found liable for damages based upon their wilful abuse of Breanna that led to her death. R. 17, 234, 235.

The plaintiff claims that the waiver of immunity found in Utah Code Ann. § 63-30-10 (1992) is applicable. This statute waives immunity for injuries proximately caused by the negligence of government employees, unless the injury "arises out of" one of a list of retentions of immunity. One such retention in subsection 2 for injury arising out of assaults and batteries. Plaintiff asks this Court to reverse its decision in Taylor v. Ogden City Sch. Dist., 927 P.2d 159 (Utah 1996). First, he asks this Court to reverse its decision that section 63-30-10(2) is applicable to assaults and batteries performed by non-governmental employees. Second, he seeks a reversal of this Court's definition of what is meant by the statutory term "arising out of."

**A. Plaintiff has not met his substantial burden of persuasion to overcome the doctrine of stare decisis.**

> Those asking us to overturn prior precedent have a substantial burden of persuasion. This burden is mandated by the doctrine of stare decisis. . . . The general American doctrine as applied to courts of last resort is that a court is not inexorably bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.

State v. Menzies, 889 P.2d 393, 398-99 (Utah 1994); State v. Bennett, 2000 UT 34 ¶ 8, 999 P.2d 1.

Plaintiff has failed to articulate, let alone clearly convince, how this Court's previous decisions are wrong. At most, he claims that the statute in question could be interpreted in different ways and therefore this Court should do away with a line of established precedents beginning with Ledfors v. Emery County Sch. Dist., 849 P.2d 1162 (Utah 1993). This Court, since Ledfors, has repeatedly rejected the claim that the retention of immunity arising out of assaults and batteries should only be applied to cases where the assailant was a government employee. Taylor, 927 P.2d at 163-64. For example, in Higgins v. Salt Lake County, 855 P.2d 231, 240 (Utah 1993), this Court explained that:

> Nothing suggests that the one committing the assault or battery need be a governmental employee, and the entire focus of the subsection is upon the negligent government employee, not on the intentionally acting assailant. Because it is the negligence of the governmental employee upon which any claim of liability must rest, it would make no sense to engraft upon that waiver a limitation based upon the status of the assailant.

Nor does the plaintiff articulate why this Court's decisions in Taylor and prior cases as to how to interpret the phrase "arising out of" are clearly wrong.

Plaintiff has failed to meet his substantial burden and the trial court's reliance upon this Court's prior decisions should be affirmed.

**B. Breanna's death arose out of an assault and battery.**

This Court has repeatedly held that the assault and battery retention of immunity apply regardless of the particular type of negligence that the plaintiff may claim, or how the plaintiff may style her claims. The important question is not the type of negligence

alleged, but rather whether the injuries arose out of an assault. In Ledfors, this Court explained:

> Again, our prior cases have looked to whether the injury asserted "arose out of" conduct or a situation specifically described in one of the subparts of 63-30-10; if it did, then immunity is preserved. We have rejected claims that have reflected attempts to evade these statutory categories by recharacterizing the supposed cause of the injury . . . . In sum, the Ledforses ignore the fact that the structure of the Utah Governmental Immunity Act, especially section 63-30-10, focuses on the conduct or situation out of which the injury arose, not on the theory of liability crafted by the plaintiff or the type of negligence alleged. Because Richie's injuries arose out of a battery, we cannot ignore the plain meaning and fair import of section 63-30-10 of the Act.

Id. at 1166-67 (citing Sheffield v. Turner, 21 Utah 2d 314, 316, 445 P.2d 367, 368 (1968)). See also Maddocks v. Salt Lake City Corp., 740 P.2d 1337, 1340 (Utah 1987) (rejecting argument that assault and battery exception did not apply to claim that two police officers negligently failed to intervene to prevent beating of plaintiff by another officer).

This Court reached the same conclusion in Malcolm v. State, 878 P.2d 1144, 1146-47 (Utah 1994); S.H. v. State, 865 P.2d 1363, 1364-65 (Utah 1993); Petersen v. Bd. of Educ., 855 P.2d 241, 242-43 (Utah 1993); and Higgins v. Salt Lake County, 855 P.2d 231, 240-41 (Utah 1993). In each of these decisions, this Court reiterated that the question of whether the retention of immunities under section 10 are applicable is determined not by considering the type of negligence alleged, but rather looking to

whether or not the complained of injuries arose out of one of the listed situations or conducts found in section 10.

Finally, in Taylor, this Court expressly defined what was meant by the statutory phrase "arose out of."

> Taylor maintains that the assault exception should not apply because Zachary's injuries have a greater link to the dangerous window in the restroom than to Trenton's assault. However, "arises out of" within the assault exception "'is a phrase of much broader significance than "cause by."'" Under the phrase's ordinary meaning, the assault need not be the sole cause of the injury to except the governmental entity from liability for the injury. The language demands "'only that there be *some* causal relationship between the injury and the risk'" provided for.

Taylor, 927 P.2d at 163 (emphasis in original).

It is undisputed that Breanna was the victim of physical abuse. Her mother was convicted of murder based on the theory that the physical abuse was causally related to Breanna's death from pneumonia, just as the assailant in Taylor had been convicted of the assault. The undisputed evidence is that pneumonia is often the terminal event for a child who has been repeatedly battered as was Breanna. R. 325-26. Plaintiff himself alleged in his complaint that "[t]he immediate cause of Breanna's death was pneumonia, which resulted from and was aggravated by the abuse and neglect to which she had been subjected." R. 8. The trial court correctly found that the evidence could only support a finding that some causal relationship existed between the physical abuse (battery) inflicted upon Breanna and her final death due to a complication - pneumonia.

For the most part, plaintiff seeks to twist the criminal trial evidence so as to be contrary to the express opinions given by the witnesses. Such efforts failed to demonstrate a genuine issue of material fact. The only evidence claimed by the plaintiff contrary to his own allegation of his complaint (that Breanna's death by pneumonia resulted from the aggravated abuse she received at the hand of her mother and her boyfriend) is the affidavit of Dr. Nygaard. R. 708-13. But Dr. Nygaard does not dispute the existence of the physical abuse. He does not dispute the crucial fact about the physical abuse; that there can be some causal relationship between physical abuse and an infant becoming more susceptible to death by pneumonia thereby. Instead, he simply claims the truism that pneumonia is directly caused by a virus or a bacteria. His affidavit fails to address at all the crucial issue of whether some causal relationship existed between the pneumonia and the physical abuse (assault and battery), instead only speaking of direct causation. The trial court correctly found that the undisputed facts showed **some causal relationship** between Breanna's death and the assaults and batteries that she endured.

But if plaintiff could prove that Breanna's death by pneumonia was unrelated to the physical abuse (assault and battery) that she suffered, plaintiff would only succeed in demonstrating that he had no cause of action against DFS. If a normally healthy child could have quickly died of pneumonia in the same circumstances, without any prior history of abuse, then plaintiff would have failed to prove any duty on the part of DFS.

No duty, other than to investigate allegations of abuse under the settlement agreement, has been alleged by the plaintiff. If the plaintiff's claims are not based on the abuse, then the plaintiff has failed to state a claim.

For these reasons, the trial court's dismissal of plaintiff's First Cause of Action should be affirmed.

## II. THE TRIAL COURT WAS WITHOUT JURISDICTION TO AWARD DAMAGES FOR ALLEGED BREACHES OF A FEDERAL DISTRICT COURT SETTLEMENT AGREEMENT

Plaintiff's second and third causes of action against these defendants both rest upon the claim that Breanna had a contract with the state defendants, created by the settlement agreement (consent decree) in the federal David C. case. Plaintiff claims that the state defendants breached the settlement agreement and that he is entitled to monetary damages for these alleged violations of their duties under the settlement agreement. The settlement agreement is not a simple final judgment. It does not set out an award of damages or a set of rights between the parties. Instead, the settlement agreement seeks to create a major change in the manner in which agencies of the State of Utah function. It sets goals as to how DFS is to function and established processes by which alleged non-conformance on a systemic and individual basis could be corrected. R. 49-104. No provision is made in the settlement agreement for monetary damages in case of non-compliance, instead the United States District Court for the District of Utah is expressly given continuing jurisdiction to enforce the agreement. R. 98.

**A. No independent cause of action exists to enforce a federal consent decree.**

The trial court correctly determined that it was without jurisdiction to inject itself into the federal court's ongoing supervision of the David C. consent decree. Instead, any claim that the settlement agreement was being violated should be addressed to the supervising federal court by means of a contempt proceeding. In the trial court, the plaintiff correctly cited (R. 177-78) a venerable United States Supreme Court decision for the long established proposition that:

> It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506; and hence the State courts have no power to revise the action of the Federal courts, nor the Federal the State, except where the Federal Constitution or laws are involved.

Claflin v. Houseman, 93 U.S. 130, 137 (1876).

More recently, the United States Tenth Circuit Court of Appeals (whose decisions are binding on the federal district court of Utah) has expressly held that state courts do not have any jurisdiction over a federally supervised consent decree. Klein v. Zavaras, 80 F.3d 432, 435 (10th Cir. 1996) ("That decree was entered by the United States District Court for the District of Colorado, and the Lincoln County Court did not have jurisdiction to enforce its terms."). Under federal law, consent decrees cannot be enforced by means of an independent action, but only through invocation of the continuing jurisdiction of the appropriate court. Figures v. Bd. of Pub. Util. of City of Kansas City, Kansas, 967 F.2d 357, 361 (10th Cir. 1992).

> The district court held that Figures could not now maintain an independent action to enforce the Consent Decree, because one could only bring this claim in the original case invoking the court's continuing jurisdiction over that matter. This ruling was not in error. . . . To permit an individual suit to enforce the Consent Decree would interfere with the court's continuing jurisdiction over that matter.

Federal law does not recognize independent damage claims based upon the terms of a settlement agreement or consent decree. Klein, 80 F.3d at 435; DeGidio v. Pung, 920 F.2d 525, 534 (8th Cir. 1990); Green v. McKaskle, 788 F.2d 1116, 1122-23 (5th Cir. 1986). In DeGidio the court best explained the purpose behind these rulings.

> In Green, the court noted that contempt actions provide an adequate remedy for violations of court orders. A consent decree is negotiated by the parties and may be extremely detailed and provide relief far beyond constitutional requirements. Thus, such decrees provide exceptional relief for prisoners. Allowing a damage claim under section 1983, as well as a contempt action for enforcement, "would discourage prison officials from agreeing to such benefits." Further, prison officials with limited resources may not be able to implement every aspect of a wide-ranging remedial decree. They may be forced to choose, possibly after consultation with class representatives, which provisions to implement. Compliance would be deterred if individual prisoners were allowed to seek damages for violations of every detail of the decree.

920 F.2d at 534 (citation omitted).

Plaintiff was free to bring a separate action for any violation of his rights, or for any state claim that he believed he possessed. But the trial court correctly held that plaintiff was not free to seek enforcement of the settlement agreement and consent decree through a separate action. This decision should be affirmed on appeal.

**B. The settlement agreement did not create a cause of action for damages.**

> "[A] consent decree or order is to be construed for enforcement purposes basically as a contract," the terms of the decree and the respective obligations of the parties must be found within the four corners of the consent decree, "[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve .... [T]he instrument must be construed as it is written" . . .

Sinclair Oil Corp. v. Scherer, 7 F.3d 191, 194 (10th Cir. 1993).

In the David C. agreement, the State of Utah agreed to many things. It agreed to meet standards on how it would respond to allegations of child abuse and many other issues. It agreed to permit its conduct to be reviewed by the monitoring panel and the class representatives' attorneys. Mechanisms were created for enforcing the settlement agreement. But at no time did the agreement create a right to monetary damages. No such condition was agreed to or even mentioned. The plaintiff's contractual claims fail because no such contractual claim for damages exists under the settlement agreement.

This Court has stated that the implied covenant of good faith and fair dealing does not "make a better contract for the parties than they made for themselves. Nor will we construe the covenant 'to establish new, independent rights or duties not agreed upon by the parties.'" Brown v. Moore, 973 P.2d 950, 954 (Utah 1998). But this is exactly what the plaintiff seeks in the instant action.

The state defendants would have refused to enter into a settlement agreement creating a contractual cause of action for damages (exempt from governmental immunity)

for claims that they failed to prevent third person violence or neglect against a child. Such liability is potentially enormous. Utah did not agree to it when it entered into the David C. settlement. It is not to be found in the lengthy consent decree. Such liability was not negotiated between the parties in David C.. While the plaintiff is free to pursue any state or federal claims he may have, no contractual claim for damages was created by the David C. consent decree. The trial court's dismissal of the plaintiff's Second and Third Causes of Action should be affirmed.

## III. PLAINTIFF FAILED TO FILE THE NECESSARY NOTICE OF CLAIM CONCERNING THE MONITORING PANEL DEFENDANTS

Plaintiff's Fourth Cause of Action is a negligence claim against the Monitoring Panel,[1] and three of its members; Pamela Atkinson, Sherianne Cotterell and Larry Lunt. As a state law negligence action, this claim is subject to the state's Immunity Act.

The Utah Governmental Immunity Act governs the procedure for suing the State of Utah, its agencies, and its employees. Both this Court and the Utah Court of Appeals have held that the filing of the notices of claim required by the Act is a jurisdictional precondition to filing any suit against the state or its employees. Rushton v. Salt Lake County,1999 UT 36, ¶18, 977 P.2d 1201; Lamarr v. Utah State Dep't of Transp., 828

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[1] The Monitoring Panel has no statutory or common law basis to be sued as a legal entity and should therefore be dismissed as a separate defendant. If it is considered a separate entity that can sue and be sued, it would partake of the same governmental immunity as DFS, as described in the first argument of this brief.

P.2d 535, 540-42 (Utah App. 1992); Madsen v. Borthick, 769 P.2d 245, 249-50 (Utah 1988). Full (strict) compliance with the requirements of the Utah Governmental Immunity Act is essential to maintain a cause of action thereunder. Lamarr; Rushton, 1999 UT 36, ¶19; Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975).

At the relevant time, the Governmental Immunity Act required that:

> [a] claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, . . . .

Utah Code Ann. § 63-30-12 (1987) (in part).

Plaintiff failed to file either of the necessary notices of claim concerning defendants. His notice of claim only pertains to the Division of Family Services. R. 45-48. The monitoring panel's budget is paid by the State of Utah pursuant to the settlement agreement. R. 95. Defendants Atkinson, Cotterell and Lunt were paid a per diem for their services on the panel by the State of Utah. Id. As such, these defendants meet the statutory definitions of employee and governmental entity found in the Immunity Act. Utah Code Ann. §§ 63-30-2(2) and (9) (1994).

Because the requisite notices of claim were not filed, the trial court was without jurisdiction to hear plaintiff's tort claim against these defendants. The dismissal of plaintiff's Fourth Cause of Action should therefore be affirmed.

## IV. THE DEFENDANT MEMBERS OF THE MONITORING PANEL ARE ENTITLED TO ABSOLUTE IMMUNITY

The role of the Monitoring Panel, in supervising the David C. consent decree, is to review all available information and issue a quarterly report on whether or not the settlement agreement has been complied with. R. 95-97. If the Panel determines that there has been non-compliance, it has the power to enter a corrective action plan to rectify the problem. R. 97. All of the decisions of the Monitoring Panel are subject to review and reconsideration by the supervising court. R. 97-98. Clearly, the Panel's members are acting as a quasi-judicial body and are entitled to absolute immunity.

> The efficient operation of the judicial process requires that those closely associated with it be afforded some form of immunity from civil liability. For that reason, the common law has long extended absolute immunity to judges for actions taken in their judicial capacities, except when those actions have been taken in the absence of subject matter jurisdiction. Quasi-judicial immunity has also been extended to others involved in the judicial process, such as prosecutors, administrative law judges, and state bar associations, their personnel and committees.
> Whether a person or entity should be afforded judicial immunity depends upon the specific work or function performed. If the acts were committed "in the performance of an integral part of the judicial process," the policies underlying judicial immunity apply and immunity should be granted.

Bailey v. Utah State Bar, 846 P.2d 1278, 1280 (Utah 1993) (citations omitted).

This Court has found that the state bar association, when acting pursuant to authority granted by this Court in matters of attorney discipline is entitled to quasi-judicial immunity. Bailey; Black v. Clegg, 938 P.2d 293, 296-97 (Utah 1997). In Ambus v. Utah State Bd. of Educ., 858 P.2d 1372, 1378-79 (Utah 1993) this Court found that the state

school board was entitled to such immunity where it made adversarial rulings based upon evidence it received.

Most analogous to the present case is Parker v. Dodgion, 971 P.2d 496, 497-99 (Utah 1998) (court-appointed psychologist entitled to quasi-judicial immunity). Just as the psychologist evaluated the evidence and made recommendations to the court, so does the monitoring panel. Its function is similar to that of a magistrate, commissioner or special master. Atkinson-Baker & Assoc., Inc. V. Kolts, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (special master entitled to absolute quasi-judicial immunity). The monitoring panel acted in a quasi-judicial capacity and its members are entitled to absolute immunity from plaintiff's claims in this action.

For this reason as well, the trial court's dismissal of the plaintiff's Fourth Cause of Action should be affirmed, as well as the dismissal of the Second and Third Causes of Action as to the members of the monitoring panel..

## V. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR NEGLIGENCE AGAINST DEFENDANTS ATKINSON, COTTERELL, LUNT AND THE MONITORING PANEL

The trial court dismissed plaintiff's Fourth Cause of Action (negligence against the monitoring panel and three individuals who have been members of it) on the grounds that he had failed to demonstrate a duty running from the monitoring panel and its members to the plaintiff's decedent. R. 241. In asking this Court to reverse that decision, the plaintiff has failed to adequately brief this issue. Instead, after a paragraph concerning whether a

negligence cause of action can be created by a contract, the entirety of the plaintiff's argument on the issue of whether these defendants owed the deceased a duty of care is comprised of two sentences, with a one sentence conclusion.

> The Monitoring Panel, including its duties and obligations, were established pursuant to the *David C.* Settlement Agreement. The Monitoring Panel Appellees duty to Breanna Loveless was to perform its contractual obligations skillfully, carefully, diligently and in a workmanlike manner.
>
> The Monitoring Panel Appellees had a duty to Breanna Loveless to perform its contractual obligations skillfully, carefully, diligently and in a workmanlike manner and the District Court's order for summary judgment on behalf of the Monitoring Panel Appellees should be overturned and the plaintiff's negligence cause of action against the Monitoring Panel Appellees should be remanded to District Court for further proceedings.

Appellant's Brief at 24.

This Court should disregard plaintiff's argument for this reason and affirm the trial court's dismissal of plaintiff's Fourth Cause of Action.

On the merits, the monitoring panel had no duty to the plaintiff or his decedent under the settlement agreement. Its function was to review evidence and prepare quarterly reports, not to become involved in individual cases. The trial court was correct in ruling that these defendants owed no actionable duty to the plaintiff or Breanna.

**A. Plaintiff's brief concerning his fourth cause of action should be disregarded.**

> Rule 24 of the Utah Rules of Appellate Procedure sets forth the requirements of an appellant's brief. One requirement is that the brief set forth an argument. That argument "shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on." As

> we have too often had occasion to explain, "this court is not '"a depository in which the appealing party may dump the burden of argument and research."'" . . .
> Instead of providing this court with meaningful legal analysis, defendant's brief merely contains one or two sentences stating his argument generally, quotes favorable portions of the record, and then broadly concludes that he is entitled to relief. . . .
> Briefs that do not comply with rule 24 "may be disregarded or stricken, on motion or sua sponte by the court."

State v. Gamblin, 2000 UT 44, ¶¶ 6-8, 1 P.3d 1108 (citation omitted); Springville Citizens v. City of Springville, 1999 UT 25, ¶ 21 n. 2, 979 P.2d 332; State v. Thomas, 1999 UT 2, ¶ 13, 974 P.2d 269 ("There is only superficial citation of authority and cursory legal analysis; his argument is hurried at best - perfunctory and slap-dash at worst. For these reasons, we decline to address this issue."); Mackay v. Hardy, 973 P.2d 941, 947-49 (Utah 1998); Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998) ("It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief.").

Plaintiff has failed to articulate what duty he claims that the monitoring panel defendants owed to Breanna. He has not sought to explain from what relationship and what responsibilities of these defendants this duty is born. Instead the plaintiff simply argues in a conclusory fashion that; 1) the monitoring panel defendants had certain duties and obligations that were created by the settlement agreement, and 2) that they had a responsibility to Breanna to perform these duties and obligations. No effort is made to articulate what the duties consisted of and in what manner they were owed to Breanna

personally. For this reason, defendants the monitoring panel, Pamela Atkinson, Sherianne Cotterell and Larry Lunt urge this Court to decline to consider plaintiff's argument concerning his Fourth Cause of Action and affirm the trial court's dismissal of the same.

**B. These defendants did not owe a duty of care to Breanna Loveless.**

"An essential element of a negligence claim is a duty owed by the defendant to the plaintiff." Owens v. Garfield, 784 P.2d 1187, 1189 (Utah 1989). "Traditionally, the common law has not required a defendant to prevent harm when doing so requires that the defendant control the conduct of another person or warn others about such conduct." Id. An exception to this general rule arises when a special relationship exists between the defendant and a third person which imposes a duty upon the defendant to control the conduct of the third person, or when a special relationship exists between the defendant and the person to be protected. Id.; Hale v. Allstate Ins. Co., 639 P.2d 203, 205 (Utah 1981).

The monitoring panel did not have a special relationship with Breanna or Bobbie Dawn Widdison or Travis Widdison. Plaintiff does not seek to establish one. Rather, plaintiff simply claims that the federal court settlement agreement that created the monitoring panel imposed some form of duty upon these defendants to protect Breanna from harm. No such duty can be found in the settlement agreement.

The monitoring panel is given access to information (R. 95-96) and required to prepare and issue quarterly reports as to whether the State of Utah is in compliance with

the terms of the consent decree. R. 96-97. Upon a finding of non-compliance, the panel has the duty to accept or prepare its own corrective action plan to bring the State of Utah into compliance. R. 97. The panel is supervised by, and its decisions can be appealed to, the federal district court. R. 97-98. Nothing in the agreement gives the panel and its members any duty or power whatsoever to control in any manner the way in which the State of Utah handles a particular individual. Instead, a system for such concerns was created that does not involve the panel, except that reports on how such challenges to individual care are resolved is to be provided to the panel for inclusion in its quarterly reports. R. 99-104.

Under the undisputed provisions of the settlement agreement, the plaintiff has failed to show the existence of any special relationship between the monitoring panel and its members and Breanna Loveless such that they would have a duty to protect her. The trial court correctly dismissed this claim and its decision should be affirmed on appeal.

## CONCLUSION

For the reasons stated above, defendants Michael O. Leavitt, Kerry Steadman, Mary T. Noonan, Jan Graham, Carol Clawson, Linda Luinstra, Pamela Atkinson, Sherianne Cotterell, Larry Lunt, the Monitoring Panel, the Utah Department of Human Services and the Division of Family Services ask this Court to affirm the dismissal of this action.

## STATE DEFENDANTS DO NOT DESIRE ORAL ARGUMENT

Defendants-appellees Michael O. Leavitt, Kerry Steadman, Mary T. Noonan, Jan Graham, Carol Clawson, Linda Luinstra, Pamela Atkinson, Sherianne Cotterell, Larry Lunt, the Monitoring Panel, the Utah Department of Human Services and the Division of Family Services do not believe oral argument is necessary to the proper disposition of this case. However, they desire to participate if oral argument is ordered by the Court.

DATED this 23rd day of August, 2000.

BRENT A. BURNETT
Assistant Attorney General
Attorney for State Defendants

## CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing BRIEF OF STATE AND MONITORING PANEL DEFENDANTS - APPELLEES to the following this 23rd day of August, 2000:

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